Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SUZANNE CAHNMANN, on Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

I. Whether the federal "filed tariff" doctrine creates federal removal jurisdiction over cases asserting purely state law claims for breach of contract, common law, and consumer fraud against a federally regulated communications carrier?

II. If so, whether the Federal Communications Act, in spite of its explicit preservation of state claims, nonetheless implicitly pre-empts all state law claims for equitable relief against deceptive marketing practices?

III. Whether the federal "filed tariff" doctrine protects consumers' rights to enforce a filed tariff's explicit term giving consumers free calls on Fridays for a year over the carrier's attempt to abrogate that provision by merely amending the tariff during the year?

PARTIES TO THE PROCEEDING

Suzanne Cahnmann and Sprint Corporation which has no parent corporation, but Deutsche Telekom and France Telecom are publicly held companies which each own 10% or more of Sprint Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Suzanne Cahnmann, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above titled proceeding on January 7, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, on which the petitioner prays for certiorari, is reported at 133 F.3d 484 and is reprinted in the appendix hereto at App. A1-11.

The opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division (Zagel, J.) finding federal question jurisdiction and entering judgment on the pleadings in favor of the defendant, Sprint Corporation, is reported at 961 F. Supp. 1229, and is reprinted in the appendix hereto at App. B1-9.

JURISDICTION OF THE SUPREME COURT

The Opinion of the Seventh Circuit Court of Appeals was entered on January 7, 1998. No petition for rehearing was filed.

Jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 203

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed

and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 414

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

STATEMENT OF THE CASE

The Plaintiff filed this case in Illinois state court asserting Illinois state law claims for breach of contract, and common law and consumer fraud. It was brought as a class action on behalf of the plaintiff and all Sprint customers in the United States enrolled or participating in Sprint's one-year "Fridays Free" calling plan (explained below). App. B1.

Sprint's "Fridays Free" Program. Beginning in January of 1996, Sprint advertised and offered for sale a one-year "Fridays Free" calling plan (hereinafter "Fridays Free" or "Free Fridays"). Under this promotion, a small business that selected Sprint as its long distance phone carrier and made a minimum of $50 per month in long distance calls could make free long distance calls anywhere in the world on Fridays for one year. App. A2. These were the terms of the contract between the plaintiff and Sprint, and were also filed in Sprint's tariff.

This promotion induced the plaintiff to switch her long distance carrier to Sprint in mid-January of 1996. Initially, Sprint honored its obligations and allowed the plaintiff and class members to make free calls anywhere in the world on Fridays. App. B1.

In the spring of 1996, however, Sprint unilaterally "modified" the Free Fridays plan by deleting ten countries from the program: Bolivia, China, Ecuador, India, Iran, Israel, Myanmar (formerly Burma), Pakistan, Thailand and the Dominican Republic. Instead, Sprint advised subscribers it would now charge the plaintiff and class members for calls made to these countries, albeit at a "discounted" rate, except for the Dominican Republic. App. A2.

The Complaint. The plaintiff filed suit in Illinois state court, asserting purely state claims for breach of contract, fraud, and deceptive marketing practices, and seeking to enforce the provisions of the contract with Sprint for the promised one year term, and to recover damages for calls that should have been free. App. A1. The complaint does *not* allege any federal claims. App. A1. It asserts *only* state law claims for breach of contract (Count I), violation of the Illinois Consumer Fraud Act, 815 ILCS 505/1 *et seq.* (Count II), violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 *et seq.* (Count III), Common Law Fraud (Count IV), and for a declaration under the Illinois Declaratory Judgment Act, 735 ILCS 5/2-701 (Count V).

Removal to Federal Court. Nonetheless, Sprint removed the case to federal court alleging both federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) and diversity jurisdiction under 28 U.S.C.

§ 1332(a). The district court held against diversity jurisdiction. App. B4.

Sprint's notice of removal premised federal question jurisdiction on the "complementary doctrines of complete pre-emption and artful pleading," claiming that the Federal Communications Act ("FCA," "Communications Act" or "the Act") and its "accompanying federal common law completely pre-empt" the state law claims. To make this allegation, Sprint recast the plaintiff's claims as challenging the reasonableness of Sprint's rates (which are set by tariffs filed with the FCC). Section 201(b) of the FCA prohibits "unreasonable practices" and § 207(b) of the Act allows customers to challenge violations of the Act. 47 U.S.C. §§ 201(b) & 207.

The plaintiff moved to remand, arguing that the FCA did not completely pre-empt the state law claims.

Sprint responded by essentially abandoning its argument of complete pre-emption and instead, arguing that the court should find jurisdiction on the basis of artful pleading alone, regardless of whether there was complete pre-emption.

The district court's decision. Without deciding the issue of complete pre-emption, the district court held that the state claims were actually artfully pled federal claims. App. B2-3.

Turning to the merits, after finding federal jurisdiction, the Court addressed Sprint's motion for judgment on the pleadings and entered judgment in Sprint's favor. App. B5-9. The Court noted the inequity of Sprint's unappealing justification for unilaterally dishonoring its agreement:

> [o]n it's face [Sprint's reasoning] is not a very appealing explanation, a variation of "I know I agreed to do this" and "you are paying the agreed upon price, but it is too difficult for me to deliver so I am just going to deliver 25% of what I agreed to deliver. God speed and good luck to you."

App. B1-2.

The Court, nonetheless, found that because it was a regulated carrier under the Federal Communications Act of 1934, under the filed tariff doctrine Sprint could abrogate its obligations. *See*, 47 U.S.C. § 203. (West 1998) ("FCA"). (App. 1 at 1-2). The Act requires all carriers to file their rates in tariffs with the FCC and to charge customers in conformity with those tariffs. 47 U.S.C. § 203 (West 1998). The Act provides no cause of action for breach of contract or fraud. Rather, it expressly preserves the state law remedies. 47 U.S.C. § 414 (West 1998).

Notwithstanding that Sprint's contract with the plaintiff and its original tariff both provided for free calls for one full year, the district court concluded that granting the relief sought by the plaintiff—i.e., compensating her and the class members for their cost of calls made on Fridays—would amount to "modifying the [second] tariff and only the FCC has that power." App. B5-6. The Court also concluded that no injunctive relief to stop the deceptive advertising was available. App. B8-9.

The court refused to consider the plaintiff's other argument that her entitlement to free Friday calls for a year vested under the terms of the original tariff, and therefore precluded Sprint's attempt to retroactively eliminate its obligations by amending the tariff. App.

6-7. The Court entered a judgment on the pleadings in favor of Sprint, and the plaintiffs appealed to the Seventh Circuit.

The Seventh Circuit's Decision. On Appeal, the Seventh Circuit affirmed the district court's order in all respects. App. A. The panel, opinion by Chief Judge Posner, found that the contract claim was a federal cause of action because if it prevailed it would effectively invalidate Sprint's second tariff. The Seventh Circuit reached this conclusion despite this Court's holding to the contrary in *Mottley*.[1] App. A6-7. Although the decision carefully avoided using the term "complete preemption," it appears to use that as the basis for jurisdiction. App. A6-7. If upheld, this case marks only the third statute enacted by Congress which provides complete pre-emption.[2]

Having found jurisdiction, the Seventh Circuit then concluded that the contract claim was barred by the filed tariff doctrine, and that the claims for common law and consumer fraud were also barred—even to the extent that they sought purely injunctive relief to require Sprint to honestly disclose its practices. App. A8-10.

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[1] *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

[2] Complete preemption has been found under only two statutes: the Labor Management Relations Act § 301, codified as 29 U.S.C. § 185(a), *see Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983); and claims under ERISA. *See, Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Outside of the statutory context complete preemption has only been found in cases challenging the ownership of Indian Tribal Land. *See*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974).

Finally, although the issue was extensively briefed, the Seventh Circuit omitted any ruling on the issue of whether the plaintiff was entitled to enforce the time period terms of the original tariff.

REASONS FOR GRANTING THE WRIT

In both finding jurisdiction and holding that no relief—including injunctive relief prohibiting deceptive marketing practice—is allowed the Seventh Circuit has enlarged an already sizable split on these issues among the Circuits. The issue of first impression of the enforceability of a specific time provision in a filed tariff presents an additional need to grant the writ.

I. THE FEDERAL CIRCUITS ARE HOPELESSLY CONTRADICTORY OVER WHETHER THE FEDERAL COMMUNICATIONS ACT FEDERALIZES STATE LAW CLAIMS ASSERTED AGAINST A REGULATED CARRIER.

As the Seventh Circuit's opinion in this case acknowledged, the federal circuits are split over whether a purely state law complaint asserting state law claims of fraud, breach of contract and state statutory violations is properly removable under the theory that any claims involving long distance phone service *must* arise under federal law since the carriers are required to file their rate tariffs with the FCC. App. A6.

The Circuits utterly clash on whether these are federal claims at all. Even those courts that find federal jurisdiction exists disagree on the basis for jurisdiction—i.e., complete pre-emption, as alluded to in this

case,[3] federal common law,[4] or some other theory. Further, some courts have held that certain claims, such as contract claims, arise under federal law while other state claims, such as fraud or deceptive practices, do not arise under federal law.

The correct view, we think, is that the filed tariff doctrine is nothing more than a defense of pre-emption in some cases, and does not itself confer federal question jurisdiction.[5] This Court's decision in *Mottley*, 211 U.S. 149, has been cited hundreds of times as the seminal holding that a federal defense does *not* confer jurisdiction. *Mottley* was filed in federal court and explicitly

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[3] Citing *Metro. Life*, 481 U.S. at 63-64 (which states that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character), the Court held that here "[f]ederal law does not merely create a right; it occupies the whole field, displacing state law." App. A6. This decision, however, cannot possibly be reconciled with *Metro. Life,* which went on to find complete pre-emption only because of the additional evidence that Congress intended such an extraordinary power in light of the fact the language in ERISA closely mirrored the LMRA which was the only other statute in which this Court has found complete pre-emption. *Metro. Life*, 481 U.S. at 64-65.

[4] E.g. *In re Comcast Cellular Telecomm. Litig.,* 949 F. Supp. 1193, 1204 (E.D. Penn. 1996).

[5] In fact, Sprint itself routinely files state court breach of contract actions to recover unpaid debts from customers. *E.g. U.S. Sprint Communications Co. v. Computer Generation,* 401 S.E. 2d 573 (Ga. App. 1991); *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.,* 624 N.E.2d 1048 (Ohio 1994). Moreover, Sprint has even successfully appealed a trial court's dismissal of state law claims for money due and unjust enrichment—based on Sprint's filed tariffs—where the court had found the claims solely within the jurisdiction of the FCC or the federal courts. *Computer Generation,* 401 S.E.2d 573.

challenged the tariff. *Id.* at 150-51. This Court *sua sponte* remanded for lack of jurisdiction, holding that the Mottleys had artfully pled what was in reality a federal defense that the tariff pre-empted their contract claim. The opinion below brushes aside *Mottley's* long-standing precedential value as "not inconsistent" with this case by distinguishing it on the fact that the Mottleys' original contract preceded the filed tariff requirements.[6]

Indeed, the focus on the filed tariff as a basis for jurisdiction is entirely misplaced. As *Franchise Tax Bd. of Cal.*, 463 U.S. at 13 held, the proper analysis is whether state law provides a cause of action without reference to federal law. Such is the case here. State law provides a cause of action for breach of contract without any regard or reference to federal law. The federal law,—i.e., the filed tariff—becomes relevant only by way of Sprint's defense that it should not be held accountable under state law.[7]

Every year the federal courts, primarily the district courts, expend incredible volumes of judicial resources deciding if and why state causes of action asserted against common carriers arise under federal law.

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[6] The court's distinction that *Mottley* "couldn't have been thought an effort to enforce a tariff or an appeal to the regulatory commission's power to invalidate one" simply cannot withstand scrutiny. App. B8. As this Court stated, *Mottley* explicitly challenged the meaning and the validity of the Communications Act's tariff provisions. *Mottley*, 211 U.S. at 151.

[7] There is no serious dispute that Sprint's conduct is a breach of contract under state law. Indeed, even in finding for sprint the district court acknowledged as much. App. A2; App. B1-2.

Although it admitted the conflict's existence, the Seventh Circuit's opinion did not acknowledge the full scope of the divisiveness among the circuits. The wide divergence of opinions, some within the same circuit on the same facts, shows the need for this Court to resolve the issue.

Decision by Circuits:

Within the First Circuit one district court has held that there is no federal question jurisdiction. *Financial Planning Inst., Inc. v. AT&T Co.*, 788 F. Supp. 75, 77 (D. Mass. 1992). *Financial Planning* remanded a consumer case alleging common law breach of contract claims. *Id.* And although the Court of Appeals has not directly ruled on the issue, its opinion in *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707 n.6 (1st Cir. 1977), strongly indicates that it would also find against jurisdiction.[8] In fact, other courts have cited *Comtronics* as a basis for holding against jurisdiction. *Weinberg v. Sprint*, 165 F.R.D. 431, 439 (D. N.J. 1996); *Am. Inmate Phone Sys., Inc. v. U.S. Sprint Communications Co.*, 787 F. Supp. 852, 856 (N.D. Ill. 1992).

The Second Circuit is in flux. Its decision in *Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486 (2nd Cir. 1968), gave rise to the notion that state claims against regulated carriers arise under federal law, specifically federal common law. Its decision in *Nordlicht v. N.Y. Tel. Co.*, 799 F.2d 859 (2nd Cir. 1986), furthered *Ivy's* hold-

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[8] The court observed that the Act's savings clause preserves causes of action distinct from those created under the Act, such as contract claims. *Id.*

ing. Almost from its inception, however, *Ivy* received wide criticism from courts and commentators for being "extreme" and "questionable."[9] Thus, several courts distinguished or rejected *Ivy* for not deciding removal jurisdiction,[10] for not considering the FCA's savings clause[11] and for not passing muster under the Supreme Court's current requirements for complete pre-emption.[12] Within the Second Circuit, courts questioned and rejected *Ivy*'s viability.[13] And after the Seventh Circuit's opinion in this case, the Second Circuit finally overturned *Ivy's* holding that these claims arise under federal common law. *Marcus v. AT&T Corp.*, 1998 WL 91098 (2nd Cir.

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[9] Charles A. Wright, LAW OF FEDERAL COURTS, § 60 (4th ed. 1983); *MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, 980 F.2d 1021, 1022 (5th Cir. 1993).

[10] *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 554 (D. N.J. 1996).

[11] *DeCastro*, 935 F. Supp. at 554; *Am. Inmate Phone Sys.*, 787 F. Supp. at 856; *Financial Planning*, 788 F. Supp. at 77; and *Kellerman v. MCI Telecomm. Corp.*, 493 N.E.2d 1045, 1050-51 (Ill. 1986).

[12] *DeCastro*, 935 F. Supp. at 554; *Am. Inmate Phone Sys.*, 787 F. Supp. at 856; *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 816 (N.D. Cal. 1991); *Financial Planning*, 788 F. Supp. at 77; *OnCor Communication, Inc. v. State of N.Y.*, 218 A.D.2d 60, 63, 636 N.Y.S.2d 176, 178 (N.Y. App. Div., 3rd Dept. 1996).

[13] *Kaplan v. ITT-U.S. Transmissions Sys., Inc.*, 589 F. Supp. 729, 733-36 (E.D.N.Y. 1984) (rejecting *Ivy*'s reasoning in light of more recent Supreme Court and First Circuit Decisions); *Marcus*, 938 F. Supp. at 1166 (S.D.N.Y. 1996) (rejecting *Ivy*'s holding of complete preemption but holding case still arose under federal common law).

(N.Y.) Feb 24, 1998) at *6;[14] *Fax Telecomm., Inc. v. AT&T*, 1998 WL 100547 (2nd Cir. (N.Y.) March 10, 1998) at *5-7.

The Court of Appeals for the Third Circuit has not considered the issue and the district courts are split, with four of the five courts holding against jurisdiction. *Compare, Weinberg*, 165 F.R.D. at 440 (no federal jurisdiction); *DeCastro, Inc.*, 935 F. Supp. at 548-55 (same); *Bauchelle v. AT&T Corp.*, 1997 WL 797675 (D. N.J. Nov. 17, 1997) (same); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947, 952-60 (D. Del. 1997) (same), *with Comcast*, 949 F.Supp 1193 (holding claims were artfully pled claims arising under federal common law). The split in opinions between *Comcast, Sanderson*, and *DeCastro*—all of which asserted claims arising from the same facts against the same defendant—shows how divergent the views of different federal courts are on this issue, and how much judicial time is constantly being spent considering this issue.

Jurisdiction has never been contested in the Fourth Circuit, which has allowed the removed cases to proceed as arising under federal law. *See Harrison Higgins, Inc. v. AT&T Communications, Inc.*, 697 F. Supp. 220, 221 (4th Cir. 1988) (plaintiff conceded removal was proper); *Transp. Data Interchange v. AT&T Corp.*, 920 F. Supp. 86, 87 (D. Md. 1996) (summarily holding federal question existed under the FCA).

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[14] *Marcus*, however agreed with the Seventh Circuit finding jurisdiction here, on the basis that the case effectively challenged the validity of the tariff and thus the contract claim arose under federal law. It disagreed with the Seventh Circuit that the claims for fraud arose or were preempted by federal law. *Marcus* at *5.

The Fifth Circuit squarely rejects the notion that these claims arise under federal law. *MCI Telecomm. Corp. v. Credit Builders of Am., Inc.*, 980 F.2d 1021 (5th Cir.), *vacated*, 508 U.S. 957, *prior opinion reinstated*, 2 F.3d 103 (5th Cir.), *cert. denied*, 516 U.S. 978 (1993); *KVHP TV Partners, Ltd. v. Channel 12 of Beaumont, Inc*, 874 F. Supp. 756 (E.D. Tex. 1995); *Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996). Indeed, the Seventh Circuit's opinion in this case acknowledges creating a conflict with the Fifth Circuit. App. A6. The Seventh Circuit's reasoning—that the Fifth Circuit's decision was in error because it did not consider *Thurston*[15] or *Rice*[16]—misses the mark. In both of those cases, the plaintiff was a regulated carrier whose federal complaint explicitly pled causes of action alleging violations of the Interstate Commerce Act. Neither of these cases involved removal, or even allegations of state law violations. Thus, they shed no light on whether a complaint filed in state court alleging only state law violations nonetheless arises under federal law.[17]

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[15] *Thurston Motor Lines Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983)

[16] *Louisville & N.R. Co. v. Rice*, 247 U.S. 201 (1918)

[17] The Seventh Circuit's analysis is akin to holding that a complaint filed in state court asserting violations of only state antitrust laws arises under federal law, and supporting that reasoning by citing decisions finding federal jurisdiction in cases asserting federal antitrust claims. *But see e.g., In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp 1181, 1184-85 (N.D. Ill. 1996) (remanding state antitrust claims for lack of federal jurisdiction).

The Sixth Circuit appears to hold the claims do arise under federal law, although the precise basis is unclear and the Appellate decision was in the context of a case where the carrier filed in federal court alleging on the face of the complaint that it was an action to collect under the tariff. *See, MCI Telecomm. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993) (holding the "duty to pay a certain price for phone service is a federal obligation."); *In re Long Distance Telecomm. Litig. v. GTE Sprint Communications*, 622 F. Supp. 282 (E.D. Mich. 1985) (holding federal question existed because state law claims were pre-empted by the FCA).

In a suit filed by a regulated carrier alleging violations of the Act, the Eighth Circuit held there is jurisdiction, but also suggested that a complaint filed by a consumer alleging breach of contract would not be a federal claim. *MCI Telecomm. Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387 (8th Cir. 1992). Additionally, prior to the *MCI* decision, one district court had held such state law claims actually do arise under federal common law. *Thermalcraft, Inc. v. Sprint Communications Co.*, 779 F. Supp. 1039 (W.D. Mo. 1991).[18]

In the Ninth Circuit, district courts hold there is no federal jurisdiction under either federal common law or complete pre-emption. *Boyle*, 766 F. Supp. 809 (remand-

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[18] We also note that *Thermalcraft* was expressly based on the Second Circuit's decisions in *Ivy* and *Nordlicht*. *Thermalcraft*, 779 F. Supp. at 1041-42. Thus its basis is highly questionable since: the Court of Appeals for the Eighth Circuit later refused to consider whether these cases applied, *Garden State*, 981 F.2d at 388; and the Court of Appeals for the Second Circuit has recently overturned its holdings that jurisdiction arises under federal common law. *Marcus*, 1988 WL 91098.

ing for lack of subject matter jurisdiction); *Heichman v. AT&T Co.*, 943 F. Supp. 1212 (C.D. Cal. 1995) (same).

There are no reported decisions on point in the Tenth Circuit and the two unreported district court decisions are split. *Compare, Wickman v. Canandaigua Wine Co.*, 1993 WL 390052 (D. Kan. Nov. 10, 1993) (remanding state law claims for lack of jurisdiction) *with Allstate Asbestos Removal, Inc. v. United Telecomm. Inc.*, 1993 WL 62113 (D. Kan. Feb. 18, 1993) (finding federal jurisdiction based on the Second Circuit's now overturned holding in *Nordlicht*).

Finally, the Eleventh Circuit has found federal question jurisdiction, in a suit filed in federal court by a regulated carrier. *Western Union Int'l, Inc. v. Data Development, Inc.*, 41 F.3d 1494 (11th Cir. 1995). More recently, two of the district courts split over removal of a case in which the complaint alleged only state law claims. *Compare, Lipcon v. Sprint Corp.*, 962 F. Supp. 1490 (S.D. Fl. 1997) (remanding for lack of jurisdiction), *with Mellman v. Sprint Communications Co.*, 975 F. Supp. 1458 (N.D. Fl. 1996) (holding federal question jurisdiction supported removal).

In sum, there is considerable disagreement between the circuits and their district courts over whether state claims asserted against regulated phone carriers actually arise under federal law. Further, even among the courts that do find federal jurisdiction there is substantial disagreement over its basis—i.e., federal common law, complete preemption, or artful pleading of some unspecified provision of the Act. This Court's resolution of this long-divided question of federal jurisdiction is necessary and appropriate.

II. THE FEDERAL CIRCUITS DISAGREE OVER WHETHER THE FILED TARIFF DOCTRINE ENTIRELY PRE-EMPTS ANY STATE LAW CLAIMS AGAINST A PHONE CARRIER WHO COMMITS FRAUD.

Independent of the jurisdictional issue, there is also a circuit conflict over whether the FCA pre-empts all state law claims alleging fraud and deceptive marketing practices by a regulated carrier. The Seventh Circuit's opinion declares that, contrary to the express language of its savings clause,[19] 47 U.S.C. § 414, the Communications Act pre-empts claims of fraud arising from a carrier's deceptive marketing practices. App. A9. The Court went so far as to hold that a state cannot enjoin the deceptive marking practices. App. A9.[20] Sprint currently advertises free Friday calls until the year 2000.[21]

Although the Second Circuit has recently agreed with the Seventh Circuit's holding that the contract claim in this case arose under federal law, it disagreed with the treatment of the fraud claims and the "broader implica-

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[19] The court held that the Savings Act is broadly written, and its plain meaning would preserve the plaintiffs' claims, but went on to hold that it would not enforce the savings clause as written. App. A5.

[20] The issue is not whether Sprint is misrepresenting the terms of its tariff *du jure*. Rather, the plaintiffs seek an injunction requiring Sprint to stop its deceptive practices, which would require it to honestly advertise the fact that its "promise" of Free Friday calls is nothing more than a sham—i.e., that, unlike any other business, Sprint is not bound by its "promise" but instead could unilaterally change the tariff to reduce or eliminate the free calls, and in fact has already done so.

[21] Sprint Corp., *www.sprint.com* (visited April 6, 1998) <http://www.sprint.com/bizpark/bizanswers/moreinfo.html>.

tions that every state law claim challenging a carrier's rates or billing practices necessarily arises under federal law." *Marcus,* 1998 WL 91098 at *5.

The Seventh Circuit's opinion is also in direct conflict with the Illinois Supreme Court's holding that claims for fraud are not pre-empted by the Communications Act. *Kellerman*, 493 N.E.2d 1045. Many other courts have reached the same opinion as *Kellerman*, and, in fact, have expressly agreed with its holding. *E.g., Transportation Data*, 920 F. Supp. at 89; *Cooperative Communications*, 867 F. Supp. at 1515; *Harrison Higgins,* 697 F. Supp. at 223.

Simply put, there is no basis for viewing the Communications Act as pre-empting all state law fraud claims, and instead giving regulated carriers *carte blanche* to fraudulently advertise. The statute itself provides to the contrary. 47 U.S.C. § 414. There is nothing in the language, legislative history, or policy underlying the Act that even remotely supports this conclusion. In light of the tremendous inequities of the filed rate doctrine,[22] this holding is more egregious. If the court will not compel companies to honor their agreements, certainly nothing is gained by prohibiting the states from requiring the companies to be honest in their marketing. Indeed, the need to enforce injunctive relief under state fraud statutes and common law is especially heightened as it may be the only protection left for consumers.

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[22] For an example of the inequities of the filed rate doctrine and the reality that it has outlived its usefulness, and does nothing more than shield phone companies from their acts of fraud and breaches of contract, *see, e.g., Fax Telecomm.*, 1998 WL 100547.

III. THE ENFORCEABILITY OF TEMPORAL TERMS OF A RATE TARIFF PRESENTS AN IMPORTANT AND FAR REACHING QUESTION OF FIRST IMPRESSION.

This case also presents an additional first impression question of potentially far reaching impact, which the courts below refused to resolve: whether a consumer can use the filed rate doctrine to enforce a filed tariff's provision that a rate will remain in effect for a specific period of time. Phone companies are increasingly advertising and promising terms of service which they subsequently unilaterally change. Where these promises are contained in a tariff the carrier simply amends the tariff to reflect the change, as happened in this case. Thus, if this decision is allowed to stand, the terms of the tariff are, in essence, meaningless since the carrier can change them at will.

Thus, as shown in this case, even though the tariff explicitly stated that the consumer could "receive free usage . . . one day a week (such day to be determined by Sprint) for 12 months," Sprint has thus far been allowed to dishonor that term. Especially under the strict auspices of the tariff doctrine, there is no statutory or policy basis for holding that temporal terms of a tariff are not enforceable on the same basis as any other term.

The Court can, and should, use this opportunity to impose *some* control on the deceptive marketing practices of regulated carriers. Upholding the enforceability of *all* the terms of the tariff, and allowing the states to enjoin the carriers to disclose those terms will eliminate much of the unnecessary harshness of the filed rate doctrine.

CONCLUSION

This case squarely demonstrates the need for this Court to resolve a deep conflict among the circuits over whether the Federal Communications Act federalizes and thus creates removal jurisdiction over state law claims for breach of contract and fraud asserted against a common carrier. If the Court finds jurisdiction, it should resolve one conflict over whether the Communications Act pre-empts *all* claims to prohibit deceptive advertising. Finally, the Court should also resolve the important question of first impression—whether consumers can enforce a tariff's promise to keep a filed rate in effect for a specific time period.

Accordingly, the Petitioner prays the Court grant her requested petition for certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 97-2088

SUZANNE CAHNMANN, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

SPRINT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 5129—**James B. Zagel**, *Judge.*

ARGUED NOVEMBER 7, 1997—DECIDED JANUARY 7, 1998

Before POSNER, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges.*

POSNER, *Chief Judge.* Sprint, a communications common carrier regulated by the FCC, was sued by customers of Sprint's "Fridays Free" long-distance calling promotion in a class action originally filed in an Illinois state court. The suit was removed to federal district court, which entered judgment for Sprint. The district judge ruled that although the complaint does not allege any violation of federal law and there is no diversity of citizenship, the suit was removable because the sort of claim that the class is making can arise only under federal, and not under state, law. Characterizing the federal claim as one to invalidate a tariff filed with the

FCC, the judge gave judgment for Sprint on the pleadings, on the ground that he would be invading the FCC's jurisdiction if he invalidated the tariff.

In January 1996, Sprint had filed with the FCC a tariff setting forth the terms of a new service intended to attract long-distance customers to Sprint from other telephone companies. The tariff offered, to small businesses that agreed to subscribe to Sprint for a minimum of $50 in long-distance calls per month, up to $1,000 worth per month of free long-distance calls on Fridays to *anywhere in the world* for *one year*. Four months later, Sprint amended the tariff to delete ten countries, including Israel and China, from the offer of free Friday calling, although under the amended tariff customers receive a 25 percent discount off Sprint's regular rates for all calls (not just Friday calls) to nine of the countries (all but the Dominican Republic, for reasons not disclosed by the record).

The class members, several thousand in number, are "Fridays Free" customers who are continuing to call one or more of the ten countries and paying more, on balance, than they would have had to pay had the original tariff remained in force. Sprint claims to have had good reasons, having to do with congested phone lines and customer fraud (residential customers pretending to be small businesses), for amending the tariff. But there is no evidence on the issue, and for purposes of this appeal we assume that Sprint had no good reason for the amendment—or, worse, that it was planning from the start to renege on the offer of a full year of free Friday calls to anywhere in the world.

The first count in the complaint charges that Sprint broke its contract with its "Fridays Free" customers. It promised them the full year; it received consideration for the promise in the form of the minimum monthly paid calls; it broke its promise. Q.E.D. The plaintiff acknowledges that Sprint might interpose as a defense that in reneging on its promise it was merely complying with the amended tariff; that the Communications Act requires a common carrier to comply with its

tariffs, 47 U.S.C. § 203(c); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 230 (1994); and that the defense might therefore be a good one (though she thinks not). But she points out that a suit cannot be removed to federal court merely on the basis of a federal defense. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-14 (1983); *Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir. 1997).

Public utility regulation and common carrier regulation (essentially the same form of regulation, the term "common carrier" being generally used of firms providing transportation or communications and "public utility" of firms providing electricity or gas) have been rolled back very far in recent years. But a piece of it survives in its pristine form in the provision of long-distance telephone service. The terms and conditions of service are set forth in "tariffs," which are essentially offers to sell on specified terms, filed with the FCC and subject to modification or disapproval by it. Once a tariff is filed and until it is amended, modified, superseded, or disapproved, the carrier may not deviate from its terms. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922); *Norwest Transportation, Inc. v. Horn's Poultry, Inc.*, 23 F.3d 1151, 1153 (7th Cir. 1994).

The original declared purpose of the tariff system was to prevent the utility or carrier from discriminating in price or service among its customers; a covert purpose was to discourage price competition by preventing secret discounts (tariffs are published documents). George W. Hilton, "The Consistency of the Interstate Commerce Act," 9 *Journal of Law and Economics* 87 (1966). These purposes are no longer widely supported, but the rule remains, vestige though it is: the carrier may not deviate from the terms of the tariff. It doesn't matter how eager both the carrier and its customers are to strike a special, off-tariff deal, *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990), or even whether the customer

reasonably relied on the carrier's promise to file the negotiated rate as a tariff. See *id.* at 124 n. 7.

What this means is that the filed tariff is the contract between the plaintiff (and the other members of the class) and Sprint. Or rather tariffs, since there were two. The plaintiff treats the first tariff, the one filed in January of 1996, as the contract between her and Sprint. If Sprint violated the tariff to her detriment, she would be entitled to proceed against Sprint under federal law. She could either seek reparations in an administrative proceeding before the FCC, or she could bring a suit for damages directly under the Communications Act, 47 U.S.C. §§ 206, 207; *Stiles v. GTE Southwest Inc.*, 128 F.3d 904, 907 (5th Cir. 1997); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1435 (3d Cir. 1991), though if an issue arose in the suit concerning the validity of a tariff the court would interrupt the litigation and, pursuant to the doctrine of primary jurisdiction, compel the parties to resort to the FCC for a determination of that validity, after which the suit could resume if any other issues, such as relief, remained. *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-65 (1956); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 120-21 (7th Cir. 1982); *National Communications Ass'n, Inc. v. American Tel. & Tel. Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995); *Allnet Communication Service, Inc. v. National Exchange Carrier Ass'n, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992). Sprint would no doubt defend against the suit on the basis of the amended tariff, which it was duty-bound to comply with. The plaintiff would respond to this defense by asking the FCC to hold the second tariff invalid because unreasonable, see, e.g., *Maislin Industries v. Primary Steel, Inc.*, *supra*, 497 U.S. at 129 n. 10, and that would be the setting in which Sprint's reasons for amending the original tariff would be ventilated and evaluated.

The plaintiff could thus have obtained all the relief to which she is entitled on the contract count—free calls to the ten countries for a full year, if her contract claim is sound—in a judicial or administrative or combined judicial and administrative proceeding under the Federal Communications Act.

The issue is whether her federal remedy is exclusive or whether she can instead seek relief under Illinois' common law of contracts.

The Act does not say, and in fact contains a provision saving other remedies. 47 U.S.C. § 414. Although the provision is broadly written, if it were interpreted literally as permitting a state-law breach of contract suit regarding a tariffed service it would impair the Act's policy of confining telecommunications common carriers to tariffed services and vesting the FCC with primary jurisdiction to determine the validity of tariffs; indeed, it would effectively nullify the tariff provisions of the Communications Act. Such interpretations of savings clauses in common carrier statutes—interpretations that would empower state courts to gut the federal regulatory scheme or would place the carrier under inconsistent obligations—are therefore rejected. See for the general proposition *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298-300 (1976); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915), and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself"), and for its application to section 414 of the Communications Act *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994), and *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387-88 (8th Cir. 1992). The plaintiff in effect wanted the state court to knock out Sprint's second "Fridays Free" tariff on the ground that it violated the contract created by the original offer of the service and the plaintiff's acceptance of the offer. Such a procedure, bypassing the FCC, cannot have been the sort of thing intended by the savings provision, the proper operation of which is illustrated by *In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633-34 (6th Cir. 1987). A carrier was accused of having represented that its rates were lower than a competitor's without revealing that, unlike the competitor, it charged its customers for their uncompleted calls. This was a claim of simple fraud, and its adjudication did not require determining the validity of a tariff.

But all that this analysis establishes is that the plaintiff cannot look to the savings provision as a source of a right to challenge the second tariff under state law. Left unresolved is whether the federal Act extinguishes the right to bring a suit for breach of contract under state law when the effect of the suit would be to challenge a tariff. We think the Act does extinguish that right—that it does not just provide a defense that the carrier might interpose in a suit under state law.

Remember that Sprint's tariff (either in its original form or as amended) *is* the contract. Any rights that the plaintiff has to complain about a breach of contract are rights granted to her by the original tariff and protected against the amendment by the principle of reasonableness that the FCC uses to determine the validity of a tariff (or, as here, an amendment to a tariff) when it is challenged. A tariff filed with a federal agency is the equivalent of a federal regulation, *Lowden v. Simonds-Shields-Lonsdale Grain Co., supra*, 306 U.S. at 520; *Western Union Int'l, Inc. v. Data Development, Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecommunications Corp. v. Garden State Investment Corp., supra*, 981 F.2d at 387, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law (both types of suit being comprehended in the plaintiff's contract count), arise under federal law. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam); *Louisville & Nashville R.R. v. Rice*, 247 U.S. 201 (1918); *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3d Cir. 1995); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968). (*MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, 980 F.2d 1021 (5th Cir. 1993), holds to the contrary, but is impossible to reconcile with Supreme Court authority—the court failed even to cite *Thurston* or *Rice*.) And since the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce. Federal law does not merely create a right; it occupies the whole field, displacing state law. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust,*

supra, 463 U.S. at 23-24; *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1075 (7th Cir. 1992).

It is not as if the "Fridays Free" tariff had promised free calls and another provision of a contract between the plaintiff and Sprint had promised to sell the plaintiff a bushel of Ugli fruit at market price. If the promises were severable, *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1439 (7th Cir. 1993); *In re Balfour MacLaine Int'l Ltd.*, 85 F.3d 68, 81 (2d Cir. 1996), the plaintiff could sue to enforce the latter promise, though not the former. There is no space between the contract and the tariff here, as there was, the Ninth Circuit found, in the arrangement between carrier and customer at issue in *Central Office Telephone, Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 989-90 (9th Cir. 1997), cert. granted, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997); and so there is no room for a state law claim of breach of contract. There probably was no room in *Central Office* either. The dissenting judge pointed out that AT&T was forbidden to offer nontariff services, so there could be no breach of contract claim based on the offer—because there could be no contract. 108 F.3d at 996. But that is a detail so far as the present case is concerned. "[A]lthough a user's refusal to pay charges fixed by a tariff will often arise in the context of a broken contract, the carrier's claim for payment is necessarily based on the filed tariff." *MCI Telecommunications Corp. v. Garden State Investment Corp.*, *supra*, 981 F.2d at 387. Equally, although a carrier's refusal to honor the terms of a tariff (in this case, the first "Fridays Free" tariff) will often arise in the context of a broken contract, the customer's claim for damages resulting from that refusal is necessarily based on the filed tariff, with the added wrinkle that to prevail the customer here had to knock out the second tariff, which she could do only under the Communications Act.

We do not think that *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), on which the plaintiff puts heavy weight, is inconsistent with our conclusion. True, that case, which the Supreme Court held arose under state law, is very similar to this one (it involved lifetime free passes); and the fact that it arose in the railroad industry rather than the communications

industry is immaterial. But there is a crucial difference. The requirement that the carrier provide the service in question in accordance with tariffed terms didn't come into the law until after the contract between the railroad and the plaintiffs was made and went into effect, so the plaintiffs' claim couldn't have been thought an effort to enforce a tariff or an appeal to the regulatory commission's power to invalidate one. It was a state-law claim whether or not subsequently extinguished by the passage of the federal law putting the subject matter of the contract under tariff regulation.

Although in our case the claim of breach of contract can be maintained only under federal law, the plaintiff emphatically disclaims any intention of prosecuting a federal claim; and it might seem therefore that the district court could not acquire jurisdiction and so should have sent the case back to the state. But the only reason to do that would have been to permit the plaintiff to proceed in state court on her breach of contract claim. Yet we have just seen that this claim can be maintained only under federal law. If on remand to the state court the plaintiff tried to press the claim in that court, she would be trying to litigate what could only be a federal claim, however denominated by the plaintiff, and so it would again be removable to federal court. The entry of judgment for the defendant was necessary and proper to end the cycle. This is an uncontroversial application of the "artful pleading" doctrine. See *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 611 (7th Cir. 1997). If a claim can arise only under federal law, because federal law has extinguished the state law basis under which it might otherwise arise, the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint.

A separate question is whether the plaintiff's other counts, which charge fraud, can be said to arise under state law. If so, the district judge, when he dismissed the breach of contract claim on the ground that it could only be federal (and the plaintiff didn't want to remain in federal court to press a federal claim), should have relinquished jurisdiction over the fraud counts, now reconceived as supplemental state law

claims to a federal claim dismissed before trial. 28 U.S.C. § 1367(c)(3); *Korzen v. Local Union 705*, 75 F.3d 285, 289 (7th Cir. 1996); *Rhyne v. Henderson County*, 973 F.2d 386, 395 (5th Cir. 1992). The plaintiff charges fraud under several Illinois fraud and consumer protection statutes as well as under the state's common law of torts, but there is no need to discuss the statutes separately. The charge is that Sprint misrepresented to prospective customers that the "Fridays Free" service would entitle them to a full year of free calls on Friday to any country in the world, rather than four months of free calls on Friday to any country in the world and eight months of free calls on Friday to any country in the world minus ten and a 25 percent discount on calls to nine of these countries any day of the week. It is not clear from the complaint whether the misrepresentation consists of a failure to disclose Sprint's right under the Communications Act to amend the tariff or a failure to disclose that Sprint never intended to keep the original tariff in force for a full year.

The principal relief sought is an injunction against continued misrepresentation, an injunction requiring Sprint to honor the promise in the original tariff, and compensatory damages. The request for an injunction against misrepresentation is a throwaway, since there is no suggestion that Sprint is concealing the terms of the amended tariff from any members of the class. With that put to one side, the relief sought by the fraud counts is identical to that sought by the contract count: the free calls promised in the original tariff. It seems, then, that in this case "fraud" is just another name for "breach of contract," so that to allow the plaintiff and her class to proceed in state court under state fraud law would allow the original tariff to be enforced, and the amended tariff set aside, in a suit under state law, which we just said is not allowed. Cf. *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 489-90 (8th Cir. 1992); *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989) (per curiam). It would be just another form of artful pleading, as we know from cases in other areas of law in which plaintiffs seek to avoid

federal jurisdiction over contract claims by recharacterizing them as fraud claims. E.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *Anderson v. Humana, Inc.*, 24 F.3d 889 (7th Cir. 1994).

This may seem a harsh conclusion. One can imagine Sprint making egregious misrepresentations to poor people ignorant of tariff regulation—promising for example a lifetime of free calls for an advance fee of $5,000, followed the next day by the filing of a tariff changing "lifetime" to "one month." But we know from *Maislin* that even reasonable reliance on a carrier's representation will not allow a suit complaining about the representation to be litigated under state law if the representation concerns a tariffed service. And the victims of Sprint's misrepresentation (if that is what it was) would still have a remedy, only under federal rather than state law, under the same provisions that authorize suits to enforce and to invalidate tariffs, see 47 U.S.C. § 204; *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *American Broadcasting Cos. v. FCC*, 643 F.2d 818, 822 (D.C. Cir. 1980)—which the hypothetical poor people's suit would be, just like the suit in this case of which our hypothetical is merely a hyperbolic variation. The plaintiffs could obtain damages and a reasonable attorney's fee, though not punitive damages. See 47 U.S.C. § 206. From a systemic standpoint the federal remedy is preferable, since class actions of thousands or perhaps even millions of telephone subscribers, litigated in state court under state law, could disrupt the federal regulatory scheme.

Once the plaintiff's claim was properly recharacterized as a challenge to the amended tariff, the doctrine of primary jurisdiction should have been invoked and the plaintiff told to repair to the FCC. But as it is plain that the plaintiff didn't want to do this, that she wanted to stand or fall on her claim that this is really a suit under state law, the district judge was right to enter judgment for Sprint rather than merely staying the suit to allow the parties to ask the Commission for a ruling on the reasonableness of the second, the amending, tariff.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 7, 1998

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 97-2088

SUZANNE CAHNMANN, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

SPRINT CORPORATION, a Kansas corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 5129—James B. Zagel, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B

[Dated April 21, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUZANNE CAHNMANN, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	No. 96 C 5129
v.	)	Judge James B. Zagel
SPRINT CORPORATION, a Kansas corporation,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Suzanne Cahnmann filed this case in state court describing it as "a class action by customers enrolled in defendant Sprint's 'Fridays Free' long distance calling promotion, promising customers who signed up would pay nothing for a year of long distance calls [anywhere in the world] on Friday." All the customers had to do was meet a monthly billing minimum on the calls for which they did pay. Although Sprint initially honored the agreement, on or about April 18, 1996, Sprint unilaterally began charging these customers for Friday calls to nine countries, albeit at a [25%] "discounted" rate. Essentially Sprint says that the change was required "by dramatic international calling volume increases that affected Sprint's ability to provide international calling services and threatened its ability to provide timely domestic service." On its face this is not a very appeal-

ing explanation, a variation of "I know I agreed to do this and you are paying the agreed upon price, but it is too difficult for me to deliver so I am just going to deliver 25% of what I agreed to deliver. God speed and good luck to you." This explanation can be offered with a straight face only because a regulated telecommunications company like Sprint has, at times, the duty to provide a minimum level of service to all its customers even at the expense of special services to some of its customers.

The first thing before me is not the validity of the claim or the explanation. It is the question of whether anything ought to be before me.

Sprint removed the case to this court and Cahnmann wants to have it remanded.

The removal is defended on the grounds that this is a federal claim disguised by artful pleading as a state law claim. The artful pleading doctrine denies a plaintiff the right to plead his case away from federal court if the only way he can do so is to omit facts that indicate federal jurisdiction or omit federal questions that are essential to recovery. *See Burda v. M. Ecker*, 954 F.2d 434, 438 (7th Cir. 1992). The doctrine is not often applied. It obviously has no application where federal law has no preemptive effect, but its application is not dependent on the existence of complete preemption. What is required is that the state court pleading actually invokes federal law and not state law. Stated another way, complete preemption on the ERISA model is not a sine qua non of the artful pleading doctrine, what is essential is that the true claim be a federal claim and not a state claim by virtue of federal legislation. *See Marcus*

v. A.T.&T. Corp., 938 F. Supp. 1158, 1165-69 (S.D.N.Y. 1996).

Is this claim artfully pleaded? I think so. By speaking generally of contract and misrepresentations to state its claims of contract breach and of fraud and deception, the complaint artfully avoids the obvious. Sprint must charge its customers in conformity with the tariffs it filed with the Federal Communication Commission. 47 U.S.C. § 203(a) (1994). Properly drafted the complaint would have said that Sprint agreed to bill its customers in conformity with its filed tariff and then amended the tariff despite its promise not to amend the tariff for one year. It would also have said that it represented it would not amend the tariff for one year and did so knowing the representation was false. The complaint is written to avoid any mention of the rate setting and rate charging mechanism for long distance phone calls because, of course, Congress has given the FCC sole authority in this area (absent surrender of that authority which has not occurred). This is a complaint about the right of Sprint to bill in a certain way, and it is a federal claim. I concur with the analysis of other judges who have reached the same conclusion. *See Marcus v. A.T.&T. Corp., supra*; *In re Comcast Cellular*, 949 F. Supp. 1193 (E.D. Pa. 1996); and *Mellman v. Sprint*, 96 cv 119-MMP (S.D. Fla. 1996).

Sprint raises one other ground for federal jurisdiction. There is diversity. The individual claims are relatively small not reaching the jurisdictional amount. They cannot be aggregated. Sprint relies on the proposition that there is a request for injunctive relief which, if granted, would cost more than $50,000.

Under *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979), the jurisdictional amount is met if the cost of the relief to defendant exceeds this amount even if the benefit to any single plaintiff does not. If the jurisdictional amount is satisfied in this way, then I have jurisdiction over that claim and all the others would come with it under supplemental jurisdiction. I think this is a good theory, and I applied it more than fours years ago. *Allen v. Citicorp Mortgage Co.*, 90 cv 5357 (N.D. Ill. 1990). Both the Fifth and Seventh Circuits took this view. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-31 (7th Cir. 1996); *In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995). The theory does not apply here, the cost of the injunctive relief to Sprint is simply the aggregate of all the claims of the individual class member. In *Allen v. Citicorp*, plaintiffs sought an injunction which would have required the defendant to re-program its computers which calculated escrow payments for many thousands of customers. If just a single plaintiff or a small class of plaintiffs had prevailed, the cost of reprogramming would still have exceeded the jurisdictional amount. The same reasoning was applicable in *Loizon v. SMH Societe Suisse*, 950 F. Supp. 250 (N.D. Ill. 1996) where the plaintiffs sought an order requiring defendant to notify a large number of persons of certain product hazards. The cost of compliance with such an order exceeded the jurisdictional amount even if only one class member prevailed in the case. The principle which Sprint seeks to use requires that its cost be computed without aggregation of individual claims. Thus Sprint cannot invoke this principle, and its diversity jurisdiction argument fails.

Sprint asks for judgment on the pleadings.

Sprint is a national company and this lawsuit has been filed in some other places as well as here. Sprint has developed a defense and has seen it prevail elsewhere. Cahnmann's lawyers have seen what has gone before and have offered grounds on which they will stand.

The Sprint theory is simple and I state it without citations. The core of the Federal Communications Act is a requirement that telecommunications providers tell the FCC what they will charge for each of their services. They file a tariff with their rates. The FCC has the power to decide whether the filed rates are reasonable. The providers have to stick to those rates, charging neither more nor less. Even if they explicitly agree with a customer to alter the rate, the agreement has no legal effect. The tariff, the filed rates, are publicly available and the law presumes a provider cannot effectively misrepresent its rates. Whatever the salesman says and whatever is advertised, the consumer can learn the truth from the FCC. And it matters not if the claim arises from an amendment to a tariff which changes the rates. The customer is presumed to be aware that amendments to tariffs are always possible. If the customer does not like the amendment, the customer has standing to complain to the FCC which can invalidate the amendment. There is, therefore, no contract to enforce, and Cahnmann's reliance upon the representations of Sprint is not a permissible basis for a damage claim. And were it permissible, there is no way that damages can be awarded. If a court were to order Sprint to compensate Cahnmann for the costs of her overseas

calls on Fridays, it would be modifying the tariff and only the FCC has that power. This defense is sound and I see no reason to restate the statutory and decisional bases for it, since that has already been done well by Judges Ross and Gibbons respectively in *Birnbaum v. Sprint Communications*, 96 CV 2514 (ARR), 1996 WL 897326 (E.D.N.Y. 1996) and *Kutner v. Sprint*, 96-2534 GV (W.D. Tenn. 1997). The defense was also sustained in a slightly different context by Judge Mukasey in *Marcus v. A.T.&T. Corp., supra.*

Cahnmann does not concede any of this but argues that even if these are the rules of this game, she can still win because all she asks is that I enforce the original tariff. This way, she reasons, I do not tromp upon the powers of the FCC and it is still a "tariff" that is the source of her telephone bills. The obvious difficulty is that I would not be enforcing "the" tariff, I would be enforcing a different tariff. I do not believe that the Federal Communications Act would permit a court to choose among several tariffs filed by a single company over the years and enforce whichever one it selects.

There are cases which enforce a tariff against claims of retroactive amendment, but there is no claim here that Cahnmann has been charged for Friday calls which occurred prior to the amendment. Cahnmann does argue, as a last resort, that there is a retroactive amendment here because the tariff said "customers can receive free usage (outbound international only) on one day a week (such day to be determined by Sprint) for 12 months." *See Alabama State Docks Dept. v. Bunge Corp.*, 655 F.2d 64, 67 (5th Cir. Unit B 1981) (ordinary rules of contract interpretation apply to interpret tariff

language). This argument is sketched rather than made.[1] There is no precedent, cited to me, for the proposition that "customer can" is, in a tariff, the equivalent of saying "the company must provide such service" or "the company promises to provide the service for up to 12 months if that is what the customer elects." I am under no obligation to consider such an undeveloped argument and I refuse to do so. *United States v. Giovannetti*, 919 F.2d 1223, 1229 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is a good point despite a lack of supporting authority or in the face of contrary authority, forfeits the point.").

Cahnmann cannot prevail and secure the principal relief she seeks. Her contract claim dies because it is the tariff and not the contract that controls the terms of business between Cahnmann and Sprint. The fraud claims fail because damages are not possible without a judicial amendment of the tariff which is forbidden. This reasoning would apply even if Cahnmann had made the more extreme allegation that Sprint had offered Free Fridays, deliberately intending to amend the tariff after

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[1] In its entirety the argument starts by quoting the tariff and then says: "It confers a right to the consumer. Any argument to the contrary by Sprint is futile. In fact, when Sprint wished to retain discretion under the tariff it specifically said so. (. . . . stating customers are entitled to one day a week of free calls 'such day to be determined by Sprint')." There was a footnote which added "As a verb [can means] to be enabled by law, agreement or custom; to have a right to." Black's Law Dictionary, 206 (6th ed. 1990); "to have the right or qualifications to . . . can denotes power or ability to do something": Webster's Encyclopedic Unabridged Dictionary of the English Language, 215 (1989 ed.).

it had lured enough customers to its service.[2] There is no fraud exception to the rule which denies judicial remedies to those who are charged the filed rates. *See Taffet v. Southern Co.*, 967 F.2d 1483, 1488-90 (11th Cir. 1992) (en banc).

The damage claims under state law are untenable since both applicable state laws, found in the Illinois Consumer Fraud and Deceptive Business Practices Act, contain specific exemptions for "actions or transactions specifically authorized by . . . any regulatory body . . . acting under statutory authority of . . . the United States," (815 ILCS 505/10b), and "conduct in compliance with . . . rules of . . . a Federal . . . agency," (815 ILCS 510/4). In *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 98 Ill.Dec. 24, 493 N.E.2d 1045 (1986), the leading state case, the state court never confronted the question of whether damages (as opposed to other remedies) were available.

Finally, there is a routine request in the complaint for a permanent injunction against continuing to advertise Free Fridays, but this relief cannot be granted on these pleadings. There is one allegation that such continuing advertising is occurring, but it is clear that the Free Friday program still exists for all but nine nations. Whether the current advertising is deceptive cannot be discerned from the pleadings (and this is unsurprising since the worth of this claim to Cahnmann is nil be-

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[2] Bait and switch is an unlikely tactic in an industry where the customer can challenge the reasonableness of the new rates at the FCC and, more importantly, can simply change carriers.

cause she now knows the truth). There might be some declaratory or injunctive remedy left to pursue under state law, but I do not see it appropriately pled in this case and I suspect there is little financial incentive to do so.[3] In defending against the motion for judgment on the pleadings, the plaintiff never raises the non-monetary remedies as a reason to keep the case alive. Indeed, in arguing for its motion to remand, plaintiff eschews the significance of injunctive relief. Claims for something other than damages are, I find, not effectively prosecuted here.

The motion of Sprint for judgment on the pleadings is granted. The motion of Cahnmann to remand is denied.

ENTER:

/s/ James B. Zagel
United States District Judge

DATE: April 21, 1997

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[3] This case was filed as a putative class action but no motion for class certification was ever filed. If one were, I doubt that plaintiff would be an appropriate class representative since the false advertising claim which would form the basis for injunctive relief would not fit her case well. If Sprint has continued to advertise Free Fridays in a deceptive way at some time after the change in tariff, an appropriate plaintiff might exist, but it is not Suzanne Cahnmann.

(2)

Supreme Court, U.S.
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No. 97-1686

In The

Supreme Court of the United States

October Term, 1997

SUZANNE CAHNMANN,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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25pp

QUESTIONS PRESENTED

1. Whether breach of contract and other claims pleaded under state law against a telecommunications common carrier, and created or governed by federal tariffing law and filed tariffs, are subject to federal question jurisdiction and thus removable to federal district court.

2. Whether breach of contract and common law tort claims pleaded under state law against a telecommunications common carrier may be dismissed when, pursuant to the filed tariff doctrine, they are inconsistent with federal tariffing law and filed tariffs.

LIST OF PARTIES

Petitioner is Suzanne Cahnmann, the plaintiff and appellant below. Respondent is Sprint Corporation, the defendant and appellee below. These parties were the only parties to the proceedings below.

Pursuant to Supreme Court Rule 29.6, Sprint Corporation states that it has no parent. Sprint Corporation has the following nonwholly owned subsidiaries, none of which are publicly traded:

Global One Communications Europe, L.L.C.
Global One Communications GBN Holding, Ltd.
Global One Communications Holding, B.V.
Global One Communications, L.L.C.
Global One Communications, Ltd.
Global One Communications Operations, Ltd.
Global One Communications Service, B.V.
Global One Communications World Holding, B.V.

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BRIEF IN OPPOSITION

Respondent Sprint Corporation respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 133 F.3d 484 (7th Cir. 1998) and is included in the Appendix to the Petition at pp. A1-A11. The memorandum opinion and order of the district court is reported at 961 F. Supp. 1229 (N.D. Ill. 1997) and is included in the Appendix to the Petition at pp. B1-B9.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1998, and the Petition was filed on April 7, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1291, and in the district court upon 28 U.S.C. § 1331.

STATUTES INVOLVED

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 203(a) provides, in pertinent part:

> Every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . , and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(c) provides, in pertinent part:

> No carrier . . . shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication . . . than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

STATEMENT OF THE CASE

This is a putative consumer class action for breach of contract and fraud, brought in state court by a purchaser of long distance telephone services offered by Respondent Sprint Corporation ("Sprint"). Sprint removed the case to federal district court and moved for judgment on the pleadings. The Petitioner moved to remand. The district court denied Petitioner's motion to remand, finding federal question jurisdiction, and granted Sprint's motion for judgment on the pleadings, based on the filed tariff doctrine. The court of appeals affirmed.

A. Factual Background

Petitioner Suzanne Cahnmann ("Cahnmann") was a subscriber to Sprint's "Fridays Free" program for small business customers. Under this program, customers committed to a monthly minimum charge and received up to $1,000 per month of free calling on Fridays. Pursuant to the common carrier provisions of the Federal Communications Act of 1934, 47 U.S.C. §§ 201-276 ("FCA"), Sprint filed its tariff governing the terms and conditions of the Fridays Free program with the Federal Communications Commission ("FCC"). The tariff for the program initially included domestic and international calling, but was amended pursuant to FCC regulations in April 1996 to exclude international calling to nine countries. The tariff amendment was necessitated by an unanticipated increase in international calling volume that affected Sprint's ability to provide international calling services and threatened its ability to provide quality domestic service.

Cahnmann filed her complaint in state court alleging that Sprint's actions constituted a breach of its contractual obligations. Cahnmann also alleged that Sprint's actions constituted unfair and deceptive trade practices in violation of the Consumer Fraud and Deceptive Business Practices Act of Illinois, 815 Ill. Comp. Stat. 505/1, and the Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/1, and that Sprint's acts constituted common law fraud. Cahnmann additionally sought relief under the Illinois Declaratory Judgment Act, 735 Ill. Comp. Stat. 5/2-701.

Absent from Cahnmann's complaint was any mention of the publicly-filed federal tariffs pursuant to which Sprint offered its Fridays Free program. The program was introduced with a tariff that became effective on January 1, 1996. Section 10.21 of the tariff provided that new and existing Sprint Business Sense® customers with a certain minimum monthly commitment level would be eligible for free usage on one day a week up to $1,000 per customer. Following a series of minor amendments, the tariff was amended on April 18, 1996, to exclude certain countries from the free usage on Fridays. It is that tariff amendment that Cahnmann challenged by filing the complaint.[1]

Sprint removed the action to federal court pursuant to 28 U.S.C. § 1441(a) and (b), based on federal question and diversity jurisdiction. As to federal question jurisdiction, Sprint stated, among other things, that jurisdiction was proper under the artful pleading doctrine because Cahnmann's claims could not stand without substantial interpretation of federal law issues. Sprint denied Cahnmann's allegations, and subsequently moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Cahnmann then moved to remand for lack of subject matter jurisdiction.

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[1] In place of free calls on Fridays to the nine countries, Sprint amended its tariff to offer a twenty-five percent discount on calls to the enumerated countries every day of the week. All tariffs regarding the Fridays Free program were prepared, filed, and became effective pursuant to the applicable rules and regulations of the FCC promulgated pursuant to its authority under the FCA. *See* 47 U.S.C. §§ 201, 203, 204, 205; 47 C.F.R. §§ 61.1-.193 (1994).

B. The District Court and Court of Appeals Decisions

The district court's April 21, 1997 decision denied Cahnmann's remand motion and granted Sprint's motion for judgment on the pleadings. Pet. App. at B1, B9. The district court first held that Cahnmann's complaint was artfully pleaded and thus subject to federal jurisdiction:

> Is this claim artfully pleaded? I think so. By speaking generally of contract and misrepresentations to state its claims of contract breach and of fraud and deception, the complaint artfully avoids the obvious. Sprint must charge its customers in conformity with the tariffs it filed with the Federal Communications Commission. 47 U.S.C. § 203(a) (1994). . . . The complaint is written to avoid any mention of the rate setting and rate changing mechanism for long distance phone calls because, of course, Congress has given the FCC sole authority in this area (absent surrender of that authority which has not occurred). This is a complaint about the right of Sprint to bill in a certain way, and it is a federal claim.

Pet. App. at B3. The court then found that Cahnmann's claims were barred under the Federal Communications Act, the filed tariff doctrine, and related law:

> The core of the Federal Communications Act is a requirement that telecommunications providers tell the FCC what they will charge for each of their services. They file a tariff with their rates. The FCC has the power to decide whether the filed rates are reasonable. The providers have to stick to those rates, charging neither more nor

> less. Even if they explicitly agree with a customer to alter the rate, the agreement has no legal effect. The tariff, the filed rates, are publicly available and the law presumes a provider cannot effectively misrepresent its rates. Whatever the salesman says and whatever is advertised, the consumer can learn the truth from the FCC. . . . There is, therefore, no contract to enforce, and Cahnmann's reliance upon the representations of Sprint is not a permissible basis for a damage claim. And were it permissible, there is no way that damages can be awarded. If a court were to order Sprint to compensate Cahnmann for the costs of her overseas calls on Fridays, it would be modifying the tariff and only the FCC has that power.

Pet. App. at B5-B6.

Based upon these findings, the district court held that Cahnmann's contract claim must fail "because it is the tariff and not the contract that controls the terms of business between Cahnmann and Sprint" and her fraud claims fail "because damages are not possible without a judicial amendment of the tariff which is forbidden." *Id.* at B7. The court also dismissed the state statutory and injunctive claims, on the further grounds of a state statutory exemption and inadequate pleading. *Id.* at B8-B9.

The court of appeals affirmed in a unanimous decision, per Chief Judge Posner, finding federal question jurisdiction:

> A tariff filed with a federal agency is the equivalent of a federal regulation, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law (both

> types of suit being comprehended in the plaintiff's contract count), arise under federal law. And since the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce.

Pet. App. at A6 (citations omitted). The court concluded further that "[t]his is an uncontroversial application of the 'artful pleading' doctrine," because if a claim can arise only under federal law, "the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint." *Id.* at A8. Moving to plaintiff's fraud claims, the court found that "the relief sought by the fraud counts is identical to that sought by the contract count," and thus inconsistent with the filed tariff. *Id.* at A9. Observing that Cahnmann was unwilling to seek an FCC determination of the reasonableness of Sprint's actions, the court affirmed the entry of judgment for Sprint. *Id.* at A10.

REASONS FOR DENYING THE WRIT

1. The Petition does not present any issue as to which there is a conflict of decisions or which constitutes an important or substantial question of federal law. The circuit court decisions are in strong agreement over the core issues presented by the Petition, and this Court's decisions support the approach taken in the circuits. The district court in this case dismissed several of the claims at issue on alternative state law and procedural grounds, thus these matters are not well-suited for review on a

writ of certiorari. The Petition also seeks review of matters that are within the primary jurisdiction of a federal agency, although the Petitioner elected to forego an agency referral in the lower courts. For these reasons, the court of appeals' decision does not merit further review.[2]

2.a. The Petition's contention that the circuits "utterly clash" over federal question jurisdiction in cases like this one is wrong. There is uniformity among the circuits that state law breach of contract claims such as those asserted here are governed by federal law and thus cases asserting them are removable.

b. Six circuits, including the Seventh Circuit here, have upheld federal question jurisdiction over breach of contract disputes concerning telecommunications services that are subject to federal filed tariff requirements. In *Marcus v. AT&T Corp.*, 138 F.3d 46, 55-56 (2d Cir. 1998),

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[2] Several recent developments diminish the significance and likely recurrence of the issues in this case. After the original filing of this case, the FCC issued its *Second Report and Order in the Matter of Policy and Rules Concerning the Interstate. Interexchange Market Place Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61 (FCC 96-424) (Oct. 31, 1996), which mandates the gradual elimination of the tariff filing regime for nondominant interexchange (i.e., long distance) carriers like Sprint in the market for interstate, domestic, interexchange services. This order is currently the subject of a stay entered by the District of Columbia Court of Appeals. Furthermore, this Court has granted a writ and heard arguments in a case presenting issues concerning the viability and application of the filed tariff doctrine. *AT&T Corp. v. Central Office Tel., Inc.*, No. 97-679 (argued March 23, 1998).

the court found that a state common law breach of warranty claim against a carrier necessarily arose from the carrier's federal filed tariff, which constitutes the contract with its customers, and thus was subject to federal jurisdiction. In *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1096 (3d Cir. 1995), *cert. denied*, 117 S. Ct. 64 (1996), the court found that a dispute over long distance services was "based upon, and draws its life from, the tariff that MCI filed with the Federal Communications Commission," thus the district court had subject matter jurisdiction. Likewise, in *Western Union International, Inc. v. Data Development, Inc.*, 41 F.3d 1494, 1497 (11th Cir. 1995), the court found that the cause of action "arises under the Communications Act." In *MCI Telecommunications Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993), the court found jurisdiction because "[t]ariffs filed with the F.C.C. conclusively and exclusively control the rights and liabilities between a carrier and its customer" and "MCI provided service to Graham according to the terms of these federal regulations." Finally, in *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387 (8th Cir. 1992), the court found that the claim was "necessarily based on the filed tariff."[3]

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[3] It matters not, as Petitioner posits, that some of these cases were brought by the carrier rather than the customer, because the claims of either must arise under the same federal law. As the court of appeals observed, "the customer's claim for damages resulting from [the carrier's] refusal [to honor the terms of a tariff (in this case, the first 'Fridays Free' tariff)] is necessarily based on the filed tariff." Pet. App. at A7; *see Louisville & Nashville R.R. v. Rice*, 247 U.S. 201, 202 (1918) (duties and obligations of both carrier and consignee arise from tariff).

c. Each of these circuit decisions relied on authority from this Court construing the Interstate Commerce Act. Because the FCA had its genesis in the Interstate Commerce Act and the two statutory schemes have similar provisions and objectives, this Court's decisions under the Interstate Commerce Act are highly persuasive in this context. *E.g., Western Union*, 41 F.3d at 1496; *Garden State*, 981 F.2d at 386-87; *see also MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (stating that the Interstate Commerce Act served as model for the FCA).

In *Louisville & Nashville Railroad v. Rice*, 247 U.S. 201, 202 (1918), this Court held that a railroad carrier's duty to collect and a consignee's obligation to pay freight charges prescribed by a tariff filed under the Interstate Commerce Act "grow out of and depend upon that act." The Court thus found that federal jurisdiction was present. *Id.* at 202-03. In *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam), the Court reaffirmed its holding in *Rice*. The Court rejected the court of appeals' decision that an action for payment for transportation services was a "simple contract-collection action," and held that the claim was necessarily based on the filed tariff. *Id.* at 533, 535. The Court observed that "'the parties are held to the responsibilities imposed by federal law, to the exclusion of all other rules of obligation.'" *Id.* at 535 (quoting *Rice*, 247 U.S. at 203). The same is true here. Sprint is subject to a comprehensive federal tariffing law that governs its relationships with long distance customers. Cahnmann's claim necessarily implicates this

body of federal law and thus is properly within federal court jurisdiction.[4]

d. Only one circuit arguably has deviated from this view, although there are conflicting decisions within that circuit itself. In *American Telephone & Telegraph Co. v. Florida-Texas Freight, Inc.*, 357 F. Supp. 977 (S.D. Fla.), *aff'd*, 485 F.2d 1390 (5th Cir. 1973) (per curiam), the Fifth Circuit affirmed a ruling that the federal district court had jurisdiction over AT&T's suit to collect charges based on a filed tariff rate. Notwithstanding this decision, in *MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, 980 F.2d 1021 (5th Cir. 1993), with little discussion, the Fifth Circuit concluded that MCI's suit to recover for unpaid charges for telecommunications services was simply a suit in contract or quantum meruit. Based on this characterization, the court concluded that federal subject matter jurisdiction was lacking. *Id.* at 1023. A district

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[4] These cases usurp the Petition's contentions that this is a matter implicating "complete preemption," or one in which removal was premised improperly on a federal defense. As the district court noted, jurisdiction "is not dependent on the existence of complete preemption." Pet. App. at B2. Instead, "[w]hat is required is that the state court pleading actually involves federal law and not state law." *Id.* *Thurston* and *Rice* make clear that claims necessarily based on a federal filed tariff are subject to federal jurisdiction. *See also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (referring to "settled principle" that a case is properly removable when the real nature of a claim is federal); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809-10 n.3 (1988) ("a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint"). Likewise, this cannot be an instance of removal based upon a federal defense, because the claim itself arises under federal law, as demonstrated by *Thurston* and *Rice*.

court within the Fifth Circuit has held that the prior *Florida-Texas Freight* decision is the controlling authority in the Fifth Circuit, *see MCI Telecommunications Corp. v. United Showcase, Inc.*, 847 F. Supp. 510, 513 (N.D. Tex. 1994), and the *Credit Builders* decision has been the subject of criticism by several other circuit decisions, including the decision in this case. *See* Pet. App. at A6 (stating that *Credit Builders* "is impossible to reconcile with Supreme Court authority – the court failed even to cite *Thurston* or *Rice*"); *see also American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996) (criticizing *Credit Builders*); *Western Union Int'l, Inc.*, 41 F.3d at 1496 n.3 (same). This confusion within the Fifth Circuit does not present the kind of conflict with the other six circuits that merits review on a petition for a writ of certiorari.

3. Although much of the argument in the Petition focuses on jurisdiction over tort and state statutory claims, this case does not squarely present the question of whether there is federal question jurisdiction over such claims. The complaint here included the obviously removable breach of contract claim, and the other claims at a minimum were subject to supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The circuit court also found that those claims were subject to federal jurisdiction because "the relief sought by the fraud counts is identical to that sought by the contract count." Pet. App. at A9. As the court observed, "in this case 'fraud' is just another name for 'breach of contract,' so that to allow the plaintiff and her class to proceed in state court under state fraud law would allow the original tariff to be enforced, and the amended tariff set aside, in a suit under state law, which . . . is not allowed." *Id.* The court thus found that

all of the claims here were effectively seeking "breach of contract relief" inconsistent with the tariff. In *Marcus*, 138 F.3d at 46, which Petitioner claims "disagrees" with *Cahnmann* on this point, the court nevertheless upheld supplemental jurisdiction over pendent state law claims because they "implicate[d]" the doctrine of preemption. *Id.* at 57. Thus, both courts actually reached the same result, rendering the supposed conflict illusory. Finally, inasmuch as the exercise of supplemental jurisdiction is a matter committed to district court discretion, it is not well-suited for review here.

4.a. The Petition does not challenge the dismissal of Cahnmann's breach of contract claims pursuant to the filed tariff doctrine, but focuses again on the common law fraud and state statutory claims. As the court found, however, "the relief sought by the fraud counts is identical to that sought by the contract count," Pet. App. at A9, thus Sprint's federal filed tariff would be a dead letter if customers could escape it by mislabeling or artfully pleading their claims. *See also Marcus*, 138 F.3d at 59-65 (dismissing fraud claims and relying on filed tariff doctrine).[5] These essentially are factual matters that are

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[5] The Petition's reliance on the FCA's "savings clause," 47 U.S.C. § 414, to preserve Cahnmann's claims is misplaced. No circuit has adopted the broad reading of the clause advocated in the Petition. As the court noted below, such an approach would "gut the federal regulatory scheme." Pet. App. at A5. The savings clause preserves only state claims that address obligations different from those created by the FCA, and cannot plausibly be read to preserve state law claims that are in direct conflict with the strict filing and charging duties mandated by the FCA, as with Cahnmann's claims here. *See also Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707-08 n.6 (1st Cir. 1977).

directly tied to the manner in which the causes of action are pleaded and the specific allegations and relief sought in the complaint, and they do not merit the Court's review.[6]

b. The second question presented in the Petition also is not appropriate for this Court's review because the district court dismissed the state statutory fraud and deceptive practice claims, including the request for equitable relief, on alternative grounds. Specifically, the court found the claims "untenable" pursuant to state statutory exemptions for matters governed by federal regulation. Pet. App. at B8. Likewise, the injunctive claim was found to be inadequately pleaded. *Id.* at B9. These rulings were

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("we read § 414 as preserving causes of action for breaches of duties distinguishable from those created under the Act"); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 442, 98 Ill. Dec. 24, 30, 493 N.E.2d 1045, 1051 ("[i]t is implausible to think that section 414 of the Act preserved all [s]tate-law remedies affecting interstate telephone carriers no matter how repugnant those [s]tate laws are to the purposes and objectives of Congress"), *cert. denied*, 479 U.S. 949 (1986).

[6] The factual distinctions also explain the differing results in the lower court cases cited in the Petition. Where the claims and relief sought did not draw upon or require interference with the federal filed tariff, those cases were permitted to go forward. Significantly, however, even customers whose claims are subject to the filed tariff doctrine are not without protection, for they may challenge the reasonableness of the carrier's action before the FCC. *See* 47 U.S.C. § 208. The FCC has the authority to grant relief to those victimized by unreasonable rates and practices. 47 U.S.C. § 205.

not challenged on appeal, and they do not merit consideration on certiorari in any event.[7]

5.a. The third question presented in the Petition asks the Court to shape the law concerning amendment of FCC tariffs. This is a matter committed in the first instance to the FCC under the doctrine of primary jurisdiction, *see, e.g., United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956), if not directly by statute. *See* 47 U.S.C. §§ 151, 201-03. As the circuit court noted, Cahnmann explicitly refused to take this matter to the FCC. Pet. App. at A10.

b. Even if the issue of the effect of tariff amendments was properly presented to this Court, the Court's decisions, as well as those of the FCC and lower courts, all support the principle that customers are bound by tariff amendments. The Court has held that "[i]f the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law." *Armour*

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[7] Petitioner's recent visit to Sprint's site on the world wide web – apparently cited to raise the implication that the alleged fraud is continuing – is beside the point here. Pet. at 18 n.21. The terms of the current Fridays Free offering are much different from that offered to Cahnmann. Among other things, all international service currently is excluded from the program. Furthermore, all of the changes to the program – as with the one change at issue here – are contained in Sprint's filed tariffs and thus available to Cahnmann and other members of the public. *See* Pet. App. at A9 ("there is no suggestion that Sprint is concealing the terms of the amended tariff").

Packing Co. v. United States, 209 U.S. 56, 82 (1908); *see also* Pet. App. at B5 ("The customer is presumed to be aware that amendments to tariffs are always possible."); *American Broadcasting Cos., Inc. v. FCC*, 643 F.2d 818, 825-26 (D.C. Cir. 1980) (holding that in determining whether a carrier's tariff provision was unlawful on its face, FCC properly refused to give any weight to the fact that the revised tariff conflicted with a contract between the carrier and two customers). The FCA itself contemplates that a carrier will amend its tariff, *see* 47 U.S.C. § 203(b), and the FCC has noted:

> As a matter of law, under the filed rate doctrine, such contractual arrangements between carriers and users could always have been superseded by a subsequent tariff filing. . . . Thus, telecommunications users have historically faced and continue today to face the potential risk that a carrier could choose to file a tariff that alters a pre-existing long-term service contract. We will, of course, carefully examine, in post-effective tariff review, any petitions from users challenging the reasonableness of any substantial alterations, and could find them unlawful.

Tariff Filing Requirements for Nondominant Common Carriers, 8 F.C.C.R. 6752, ¶ 26 (1993) (1993 WL 757320), *vacated on other grounds, Southwestern Bell Corp. v. Federal Communications Comm'n*, 43 F.3d 1515, 1526 (D.C. Cir. 1995). Accordingly, this is not an important or substantial question that justifies an exercise of this Court's discretionary review.

CONCLUSION

The petition for a writ of certiorari should be denied.[8]

Respectfully submitted,

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[8] Respondent requests that it be permitted to file a supplemental brief after the Court's ruling in *AT&T Corp. v. Central Office Telephone, Inc.*, No. 97-679, concerning the effect of the Court's ruling on the issues raised by the Petition.

Supreme Court
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No. 97-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SUZANNE CAHNMANN, on Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

Petitioner, Suzanne Cahnmann, submits this Reply brief to address an issue newly raised by the respondent, Sprint Corporation, in its Brief in Opposition to the Petitioner's requested Writ of Certiorari.

Sprint's assertion that the "significance and likely recurrence of the issues" presented in our Petition for Certiorari are diminished by (1) an FCC Order gradually eliminating "the filed tariff regime for nondominant interexchange (i.e., long distance) carriers like Sprint," and (2) this Court's pending decision in *AT&T Corp. v. Central Office Tel., Inc.*, No. 97-679 (argued March 23, 1998) is wrong and misleading. (Br. in Opposition at 8, n.1).

On the first point, the D.C. Circuit Court of Appeals has already determined that the FCC detariffing order is likely to be invalid.[1] This alone undermines Sprint's claim that the detariffing order diminishes the likely recurrence of the filed tariff doctrine in other cases.

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[1] Sprint acknowledged that the order has been stayed, but neglected to explain why, or even give a cite to the case granting the stay. (Opposition Br. at 8 n.2). Nonetheless, we were able to track down the case and circumstances surrounding the stay. On February 13, 1997, the court entered an order staying the detariffing order. *MCI Telecom. Corp. v. FCC*, No. 96-1459 (D.C. Cir.). The stay was entered on the motion of MCI Telecommunications Corporation who opposes the mandatory detariffing order. In entering the order, the Court found MCI had "satisfied the stringent standards for a stay" set forth in *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1997). The first stringent requirement was the likelihood that MCI will prevail on the merits. *Id.*

Moreover, Sprint has taken the opposite position in its challenge to the order. Sprint neglected to inform the Court that it is one of the parties suing the FCC to enjoin the enforcement of the detariffing order. In that case, Sprint claims the order is "arbitrary, capricious, in violation of the Communications Act of 1934 as amended (47 U.S.C. § 151 *et seq.*) and otherwise contrary to law." *Sprint Corp. v. FCC,* No. 97-1009 (D.C. Cir.) Sprint's Pet. for Review at 2 (filed Jan. 7, 1997).

Moreover, even if the detariffing order, as amended,[2] is upheld, it will not alleviate the filed tariff issues presented in this case. Rather, it will increase frequency of the issues recurring. Contrary to Sprint's representation, the order does not fully eliminate the filed tariff regime. It actually eliminates the filed tariffs for certain types of services, while allowing "permissive detariffing" for other types of services.[3]

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[2] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended, Order on Reconsideration,* CC Docket No. 96-61 (FCC 97-293) (Aug. 15, 1997) (hereinafter "FCC Detariffing Order" or "Detariffing Order"). Although Sprint was unquestionably aware of the additional amendments, since it was one of the parties to the reconsideration proceedings, it neglected to cite these amendments, and instead made its representations to this Court based on the order as it stood prior to the amendments.

[3] *FCC Detariffing Order* at ¶¶ 32, 36. "Permissive detariffing" allows, but does not require the carrier to file a tariff. This will clearly create additional cases calling on the courts to decide whether state law claims asserted against carriers arise under federal law, since a carrier could contract for one rate, and then file a tariff to the contrary. The carriers themselves have noted, that even where they have a rate filed, that rate would no longer be the only rate allowed by law. *Id.* at ¶ 8.

Additionally, even where the filed tariff is "eliminated" there will still be a tariff in effect for up to 45 days for customers who choose or switch their long distance service by notifying their local exchange carrier, rather then notifying the long distance carrier directly.[4] Thus the implications of the detariffing order are, in reality, additional reasons why this case is of such importance that the Court should grant our Petition for Certiorari.

On the second point, the pending case, *AT&T Corp. v. Central Office Tel. Inc.* does not deal at all with the jurisdictional issue presented here, on which the Circuits are split, of whether state law contract and consumer fraud claims asserted against a long distance carrier arise under federal law.[5]

Finally, Sprint wrongly downplays the split among the Circuits by ignoring the decisions against jurisdiction. We candidly documented that several Circuits had found jurisdiction while others had rejected it. Sprint cites only those cases, which we already cited, from six Cir-

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[4] *FCC Detariffing Order* at ¶¶ 39-44.

[5] As set forth in the Petitioner's Brief in *AT&T v. Central Office Tel. Inc.*, the issue presented in that case is "Whether, consistent with a line of decisions from this Court extending from *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155 (1912), *Davis v. Cornwell*, 264 U.S. 560 (1924), to *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the federal filed tariff requirements of Section 203 of the Communications Act of 1934 preempt state law claims that a customer of a regulated common carrier is entitled to better, costlier, and more valuable services than required by the terms of the governing tariff, and received by similarly situated customers?" Brief of Petitioner, *AT&T v. Central Office Tel. Inc.*, No. 97-679 (1997), at i.

cuits which have found jurisdiction and simply ignores the Circuits holding against jurisdiction.[6] (Br. in Opposition at 8-9). The cases speak for themselves.

CONCLUSION

In sum, neither the FCC Detariffing Order, nor the *Central Office Tel.* case diminish the likelihood that the issues presented in the Petitioner's Petition for Certiorari will recur, nor will they resolve the issues. The split among the Circuits will remain, and continue to require the expenditure of substantial judicial resources.

Accordingly, the Petitioner prays the Court grant her requested Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[6] Sprint does not cite any authority from the First, Ninth or Tenth Circuits. As our Petition for Certiorari shows, the First and Ninth Circuits hold against jurisdiction and the district courts in the Tenth Circuit are split. *See*, Pet. for Cert. at 12-17. Sprint has cited cases in the Third and Eleventh Circuits, which we also cited, holding there is jurisdiction, but ignores the cases in those Circuits holding against jurisdiction. *See, id.* at 14, 17.